

84-208

Office-Supreme Court, U.S.

FILED

JUL 20 1984

ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT
OF THE UNITED STATES -

FRANCIS X. BELLOTTI, as he,
is ATTORNEY GENERAL for the
COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

V.

PLANNED PARENTHOOD LEAGUE
OF MASSACHUSETTS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

THOMAS R. KILEY, Counsel of Record
FIRST ASSISTANT ATTORNEY GENERAL

KEVIN A. SUFFERN
DIRECTOR, DIVISION OF PUBLIC CHARITIES

LESLIE G. ESPINOZA
ASSISTANT ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MA 02108
(617) 727-2235

7120

QUESTIONS PRESENTED

I. Whether a state statute is in violation of the first amendment to the United States Constitution when it regulates telephone solicitations by charitable organizations in order to protect the property and privacy rights of its citizens.

II. Whether the standard of review for a state statute that regulates speech in a private forum that is not government property is that applied in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983), which recognized the importance of protecting the forum for the purposes for which it was created?

TABLE OF CONTENTS

<u>QUESTIONS PRESENTED</u>	i
<u>OPINIONS BELOW</u>	1
<u>JURISDICTION</u>	2
<u>CONSTITUTIONAL PROVISIONS</u>	2
<u>FIRST AMENDMENT</u>	2
<u>STATUTE</u>	3
<u>STATEMENT OF THE CASE</u>	3
<u>REASONS FOR GRANTING THE WRIT</u>	7
<u>ARGUMENT</u>	8
I. THE COURT BELOW IGNORED PRIVACY AND PROPERTY INTERESTS BY APPLYING A STRICT SCRUTINY STANDARD TO A STATUTE GOVERNING SPEECH IN A PRIVATE FORUM.....	8
<u>Introduction</u>	8
A. THE ZONE OF FIRST AMENDMENT PROTECTION IS CIRCUMSCRIBED BY THE PERSONAL AND PROPERTY RIGHTS OF OTHERS.....	17
B. SECTION 28 PROTECTS PERSONAL AND PROPERTY RIGHTS BY REGULATING SPEECH IN A PRIVATE FORUM.....	21

II. SECTION 28 IS REASONABLE REGULATION
AIMED NOT AT SUPPRESSING EXPRESSION
OF ANY PARTICULAR VIEWPOINT, BUT AT
PROTECTING THE PUBLIC IN THE USE OF
THEIR TELEPHONES AND IN THE
ENJOYMENT OF THEIR PRIVACY.....23

A. SECTION 28 IS REASONABLY AIMED
AT PROTECTING PEOPLE FROM THE
INTRUSION AND ANNOYANCE OF
UNWANTED CHARITABLE PHONE
APPEALS.....23

B. SECTION 28 IS NOT AIMED AT
SUPPRESSING A PARTICULAR
VIEWPOINT.....28

CONCLUSION.....30

TABLE OF AUTHORITIES

CASES

<u>Adderley v. Florida</u> , 385 U.S. 39 (1966).....	21
<u>Amalgamated Food Employees v. Logan Valley Plaza</u> , 391 U.S. 308 (1968).....	19
<u>Bolger v. Young's Drug Products Corp.</u> , 103 S. Ct. 2875 (1983).....	26
<u>Cox Broadcasting Corp. v. Cohn</u> , 420 U.S. 469 (1975).....	2
<u>FCC v. Pacifica</u> , 438 U.S. 726 (1977).....	24, 26, 27
<u>Greer v. Spock</u> , 424 U.S. 828 (1976).....	20
<u>Gregory v. City of Chicago</u> , 394 U.S. 111 (1969).....	23
<u>Hudgens v. NLRB</u> , 424 U.S. 507 (1976).....	19
<u>Kovacs v. Cooper</u> , 336 U.S. 77 (1949).....	24, 27
<u>Lamont v. Commissioner of Motor Vehicles</u> , 269 F. Supp. 880 (S.D.N.Y.), <u>aff'd</u> 386 F. 2d 449 (2nd Cir. 1967), <u>cert. denied</u> 391 U.S. 915 (1968).....	26
<u>Lehman v. City of Shaker Heights</u> , 418 U.S. 298 (1974).....	20, 28

Marsh v. Alabama, 326 U.S. 501
(1946).....19

Martin v. City of Struthers, 319
U.S. 141 (1943).....25

Members of the City of Los Angeles
v. Taxpayers for Vincent, 52 U.S.L.W.
4594 (U.S. May 15, 1984)...7, 15, 16, 20

Michigan v. Long, 103 S. Ct. 3469
(1983).....2

Mills v. Alabama, 384 U.S. 214
(1966).....2

Optimist Club v. Page, No.
82-293-CIV-5 (E.D.N.C. 1982).....11, 14

Perry Educ. Ass'n. v. Perry Local
Educators' Ass'n., 103 S. Ct. 948
(1983).....7, 16, 17, 28, 29

Rowan v. United States Post Office
Dep't, 397 U.S. 728 (1969).....9

Secretary of State of Maryland v.
Munson, 52 U.S.L.W. 4875 (U.S. June 26,
1984).....25

United States v. Grace, 103 S. Ct.
1702 (1984).....16

U.S. Postal Service v. Greenburgh,
453 U.S. 114 (1981).....20, 21, 22

Village of Schaumburg v. Citizens
for a Better Environment, Inc., 444 U.S.
620 (1980).....14, 25

STATUTES

28 U.S.C. §1257(3) (1970).....	2
42 U.S.C. §1988 (1980).....	5
Ariz Rev. Stat. Ann. §13-2916 (1978)...	13
Ark. Stat. Ann §41-4162 (1981).....	13
Colo. Rev. Stat. §18-9-311 (1979).....	13
Colo. Rev. Stat. §5-2-305 (1963).....	13
Conn. Gen. Stat. §7-282(b) (1983).....	13
Fla. Stat. §365.165 (1975).....	13
Ind. Code §23-7-8-6 (1983).....	13
Md. Ann. Code Art. 78, §55c (1979)....	13
Mass. Gen. Laws Ann. c. 68 (1969)...	3, 9
Mass. Gen. Laws Ann.....	
c. 68, §28 (1964) passim.....	
Mich. Comp. Laws §445.112 (1978).....	13
Minn. Stat. §325G.12 (1976)	14
Neb. Rev. Stat. §86-701 (1969).....	13
N.J. Rev. Stat. §2A: 170-20 (1975)....	14
N.C. Gen. Stat. §14-401.12(b) (1981)...	14
N.C. Gen. Stat. §75-30(a)(b) (1979)...	13
Okla. Stat. tit. 21, §1861 (1976).....	13
Or. Rev. Stat. §165.555 (1973).....	14

MISCELLANEOUS

M. Brenton, <u>The Privacy Invaders</u> (1964).....	12, 28
--	--------

F. Haiman, <u>Speech v. Privacy: Is There a Right Not to Be Spoken To?</u> 67 Nw. U.L. Rev. 153 (1972).....	18, 19
--	--------

S. Luten, Give Me a Home Where No
Salesmen Phone: Telephone Solicitation
and the First Amendment, 7 Hastings
Const. L.Q. 129, 162
(Fall, 1979).....12, 13, 23

R. Thompson, Unwanted Telephone
Calls--A Legal Remedy?, 1967 Utah L.Rev.
379 (1967).....27, 28

L. Tribe, American Constitutional
Law, §12-22.....6, 18

No.

IN THE SUPREME COURT
OF THE UNITED STATES

FRANCIS X. BELLOTTI, as he is,
ATTORNEY GENERAL for the
COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

PLANNED PARENTHOOD LEAGUE
OF MASSACHUSETTS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

OPINIONS BELOW

The opinion of the Supreme Judicial
Court of the Commonwealth of
Massachusetts, Planned Parenthood League
of Massachusetts, Inc. v. Francis X.
Bellotti, Attorney General, is reported
at 391 Mass. 709 (1984). Appendix A.
The opinion of the Suffolk Superior
Court (Fine, J.) is unreported.
Appendix B.

JURISDICTION

The decision of the Supreme Judicial Court of Massachusetts invalidating a state statute because it was held to be inconsistent with the first amendment to the United States Constitution, issued on April 23, 1984. Judgment was entered by the Suffolk Superior Court on June 22, 1984. Appendix C. The jurisdiction of this Court is claimed under 28 U.S.C. §1257(3). See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Mills v. Alabama, 384 U.S. 214 (1966); Michigan v. Long, 103 S.Ct. 3469 (1983).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

First Amendment

Congress shall make no law ...
abridging the freedom of speech...

Massachusetts General Law,
chapter 68, section 28

No charitable organization shall conduct or make any solicitation of contributions by means of paid telephone operators whose principal duties are the conducting of such telephone solicitation.^{1/}

STATEMENT OF THE CASE

Planned Parenthood League of Massachusetts, Inc. (PPLM) is a Massachusetts charitable organization. In July 1982, PPLM decided to mount a telephone campaign with the dual purpose of recruiting volunteers and soliciting

^{1/} Mass. G. L. c. 68, §§18 - 33 which regulates charitable solicitation is reproduced in Appendix D.

contributions. Stipulation ¶21. PPLM also decided to employ a professional fundraising consultant and his staff of paid telephone operators to conduct the campaign. Stipulation ¶31.

PPLM intended that the first part of each call be informative of its program and include a request that the recipient of the call volunteer time. At the end of each call PPLM planned to request contributions. PPLM hoped that no more than 25% of the call would be devoted to the actual solicitation. In 1983, PPLM planned to conduct a telephone campaign solely seeking contributions. Stipulation ¶52.

On August 24, 1982, PPLM sued the Attorney General in Suffolk Superior Court (Civil Action No. 56792), seeking a declaratory judgment that c.68, §28 is on its face unconstitutional and that

the Attorney General had misinterpreted §28 by asserting that it prohibited PPLM's proposed fundraising campaign. PPLM also sought to enjoin enforcement of the statute. The facts in the case were stipulated by the parties. PPLM amended its complaint on January 5, 1983, by voluntarily dismissing without prejudice the claim that the Attorney General had misinterpreted the statute and by requesting attorneys' fees pursuant to 42 U.S.C. §1988.

Judge Fine of the Superior Court issued a Memorandum and Order on March 2, 1983 which held that G.L. c.68, §28 is unconstitutional on its face and which enjoined the defendant from enforcing it. Appendix B. The Supreme Judicial Court of Massachusetts granted direct appellate review. The Supreme Judicial Court affirmed the judgment of the Superior Court on April 23, 1984.

Appendix A.^{2/}

2/ Although the opinions of both the Superior Court and the Supreme Judicial Court seem to indicate that the statute is not applicable and hence that it was unnecessary to reach the constitutional issue, consideration of this petition for certiorari is nevertheless proper. First, the Final Judgment entered on June 22, 1984, enjoins the Attorney General from enforcing the statute. Appendix C. Thus the instant case presents the last realistic opportunity for the Attorney General to request review of §28 by this Court. The decision of the Supreme Judicial Court in essence creates a live constitutional controversy, to the extent that such a controversy was not originally extant. See L. Tribe, American Constitutional Law 15 n. 56 (1979 Supplement)(doctrine of "Reverse Doremus"). Second, the parties stipulated that PPLM planned to conduct a campaign solely seeking contributions. Stipulation ¶52. Hence an actual controversy exists between the parties with respect to the constitutionality of the statute in a context in which §28 clearly is applicable. Third, the applicability of the statute to PPLM's conduct was not actually before either state court because the January 1983 amendment to PPLM's complaint dismissed this claim. Finally, while both state courts paid lip service to the fact that an adjudication of the constitutionality of the statute was not necessary to resolve the controversy, both courts analyzed the law under the first amendment and predicated their decision on a holding of unconstitutionality.

REASONS FOR GRANTING THE WRIT

I. This case presents two questions of first impression: is the telephone a private forum for purposes of regulation that impacts speech?; and is the regulation of telephone calls to be reviewed under a standard that recognizes the conflicting interests in private fora and thus protects privacy and property as well as free speech? See Members of the City Council of Los Angeles v. Taxpayers for Vincent, 52 U.S.L.W. 4594 (U.S. May 15, 1984) (No. 82-975); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983).

II. The holding of the court below indicates that the many state statutes and municipal ordinances which regulate telephone calls, see infra at 11, including regulation of a variety of

solicitation activities, of mechanized automatic dialer calls with or without recorded messages, of consumer credit collection calls, etc., are to be reviewed under a free speech/strict scrutiny standard that ignores the difference between speech in the street and a ringing telephone in the house.

ARGUMENT

- I. THE COURT BELOW IGNORED PRIVACY AND PROPERTY INTERESTS BY APPLYING A STRICT SCRUTINY STANDARD TO A STATUTE GOVERNING SPEECH IN A PRIVATE FORUM.

Introduction

The question presented by this case is whether the citizens of Massachusetts have a right to protect the free enjoyment and use of their private property through legislative action. This case is not about public charities; it is about the accommodation of the competing first amendment based rights of potential listeners and speakers. Telephone calls involve intrusion as

well as speech. Does Planned Parenthood - or any speaker - have a right to place their soapbox in your living room?

Section 28 of chapter 68 of the Massachusetts General Laws regulates telephone solicitation by charitable organizations because it is intrusive.^{3/}

The legal system has always recognized that while there is a right to speak there is also a right not to listen. As this Court has stated the "right of every person 'to be let alone' must be placed on the scales with the right of others to communicate." Rowan v. United States Post Office Dep't, 397 U.S. 728,

^{3/} Chapter 68 generally regulates charitable solicitation. The statutory scheme includes separate sections which address fraud, §31; accountability, §19 (filing of financial information); professional fundraisers, §23 (registration, bonding); limits to solicitor compensation, §21; misleading the public, §27; identification to be worn by paid door-to-door solicitors, §33; etc.

736 (1970). The right to be "let alone" is particularly telling in those places which, unlike parks and streets, by history and by tradition have not been areas open to public communication. This boundary between public and private fora is drawn in recognition of the purposes and underlying values of the first amendment and of the conflicting interests involved in the use of any particular forum.

The Attorney General contends first that the statute challenged in this case regulates activity occurring in a private forum. See Section I, B, infra at 20. Whether telephone communication takes place in a private or public forum is a question of first

impression.^{4/}

Second, the Attorney General posits that regulation of speech which is designed to protect privacy interests in a private forum in the home need not be strictly scrutinized, even where the private forum is not government property. The standard governing the states' or the federal government's ability to regulate in this area is a matter of serious concern. Such regulation serves to protect citizens from invasions of their privacy as well as from other intrusions. Thus regulation of charitable telephone solicitation may be seen not as an

^{4/}

In its opinion below, the Supreme Judicial Court did find that §28 regulates speech in a private forum, 391 Mass at 719 and at 719 n. 10. App. A. One federal district court found a statute similar to the one at bar unconstitutional but it did not consider the telephone's status as a public or private forum. See Optimist Club v. Page, No. 82-293-CIV-5 (E.D.N.C. 1982).

attempt to regulate speech, but to limit intrusion. See Section II, B infra at 28 (purpose and historical context of §28). Whether regulation of speech in a private forum that is not government property need be strictly scrutinized is also a question of first impression.

The question possesses enormous importance because all fifty states have statutes which regulate some aspect of telephone calls. Most states regulate obscene or harassing calls. In addition, many regulate intrusive calls.^{5/} Nine states protect the

^{5/} Commentators most often posit freedom from intrusion (as opposed to fraud) as a reason to regulate telephone solicitation. S. Luten, Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment, 7 Hast. Const. L. Q. 129 (1979); M. Brenton, The Privacy Invaders (1964); R. Thompson, Unwanted Telephone Calls -- A Legal Remedy?, 1967 Utah L. Rev. 379 (1967).

use of the phone,^{6/} by regulating automatic dialing.^{7/} Others limit undesired and annoying calls. For example, twenty-three states have statutes regulating commercial telephone solicitation.^{8/}

A number of other states have statutes regulating charitable telephone

^{6/} For example, calls received from many of so-called automatic dialer machines cannot be disconnected for 30 seconds even if the recipient repeatedly "hangs up." S. Luten, Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment, 7 Hast. Const. L. Q. 129, (1979).

^{7/} Ark. Stat. Ann. §41-4162; Cal. Bus & P. Code §17360 et. seq.; Colo. Rev. Stat. §18-9-311; Conn. Gen. Stat. §7-282(b); Fla Stat. §365.165; Md. Ann. Code Art. 78, §55c; Mich. Comp. Laws §445.112; Neb. Rev. Stat. §86-701 et. seq.; N.C. Gen. Stat. §75-30 (a)(b).

^{8/} These statutes range from a complete ban to the prohibition of false statements. See, e.g., Ariz. Rev. Stat. Ann. §13-2916; Colo. Rev. Stat. §5-2-309; Mich. Comp. Laws §445.112; Minn. Stat. §325G.12; Okla. Stat. Tit. 21, §1861.

solicitation.^{9/} In addition, a number of municipalities also regulate such calls. Regulation ranges from a total ban (Washington D.C., 2-2108 (1957)) to limits on police benevolent solicitation (Suffolk County, N.Y., Local Law No. 2-1979). The regulation of charitable solicitation may not be precisely analogous to the regulation of commercial solicitation. See, e.g., Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)(charitable solicitation protected speech). Despite any differences between the two types of solicitation, certainly the review of regulation of either type of solicitation should be

^{9/} Ind. Code §23-7-8-6; Minn. Stat. §237.075; N.J. Rev. Stat. 2A: 170-20 (police); N.C. Gen. Stat. §14-401.12(b)(declared unconstitutional, Optomist Club, supra at 11); Or. Rev. Stat. §165.555.

mindful that the public street is different from a privately owned telephone. The Supreme Judicial Court erred by failing to recognize such a difference.^{10/}

The second reason that the question of review of this kind of regulation is important is because of the rapid development of electronic devices capable of two-way communication. These include certain interactive forms of cable television, home computers with data transmission capabilities and even residential hook-ups with police and fire departments.

The Attorney General does not contend that these forms of

^{10/} The Supreme Judicial Court did not have the benefit of Taxpayers for Vincent, supra at 7, 52 U.S.L.W. 4594.

communication do not implicate constitutional interests. On the contrary, the potential for Orwellian use of these twentieth century devices is so great that new standards may have to be developed to protect from intrusions into the home. This Court has already indicated that the application in all situations of a single, stringent first amendment test is probably inappropriate. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983). See also U.S. v. Grace, 103 S. Ct. 1702 (1984); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, et. al., 52 U.S.L.W. 4594 (U.S. May 15, 1984)(No. 82-975). The Court in Perry indicated that laws which deal with communication in a private forum are not subject to the requirements of compelling state interest, an absence of

less restrictive alternatives, and strict scrutiny of legislative classifications. Indeed the standard of review applicable to speech of even the most protected nature in such a private forum is "... whether (the distinctions made in the regulation)... are reasonable in light of the purpose which the forum at issue serves." Perry Educ. Ass'n, 103 S. Ct. at 957. The Attorney General posits that such a standard is appropriate wherever the state's regulations touch on a private forum and those regulations are designed to further the important privacy rights of its citizenry.

A. THE ZONE OF FIRST AMENDMENT PROTECTION IS CIRCUMSCRIBED BY THE PERSONAL AND PROPERTY RIGHTS OF OTHERS.

While the first amendment broadly protects rights of speech and association, the protection it confers

is not to be confused with an unlimited license for speakers to trample over the rights of others. F. Haiman, Speech v. Privacy: Is There a Right Not To Be

Spoken To?, 67 N.W.U.L. Rev. 153

(1972). For example the common law torts of battery, assault and trespass have long functioned as effective limits upon the time, place and manner of expressive activities. The first amendment has never meant that a person could bang down one's door and speak in a private living room. Even in a public park, a zealous speaker could not grab a potential listener by the shoulder and force his attention. As one commentator has noted, "The Constitution tolerates (and may even compel) placing the homeowner's right to exclude unwanted views above the speaker's desire to intrude upon them." L. Tribe, American Constitutional Law, §12-22.

As a general rule, first amendment considerations do not outweigh the rights of private property. See Haiman, supra p. 18, at 158. This general rule is proven by its exceptions. Property rights may give way to free speech notions when the forum (though private property) resembles a traditionally public place as for example a shopping mall which has assumed the function of the traditional marketplace.

Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968), but see, Hudgens v. NLRB, 424 U.S. 507 (1976) (in effect overruled Logan Valley by upholding private property rights). Again speech rights may win out when the private property constitutes the only practical and effective forum for debate as for example in a company town. Marsh v. Alabama, 326 U.S. 501 (1946). Absent such special considerations, public

debate is limited to public property. Private property may be used only at the invitation of its owners.

The government too may silence debate at certain locations. These are public properties but nevertheless "private fora" for first amendment purposes. Reasonable time, place and manner restrictions are routinely upheld on government property which has a primary purpose unrelated to public speech and to which the public has only limited access. Greer v. Spock, 424 U.S. 828 (1976) (military base); United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (mailbox); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city transit). See also Members of the City Council of the City of Los Angeles v. Taxpayers fo Vincent, et. al., 52 U.S.L.W. 4594 (U.S. May 15, 1984)(No.

82-975). Indeed a severe limit on speech may be permissible in such locations given a sufficient justification. Adderley v. Florida, 385 U.S. 39 (1966) (press access to prisons).

B. SECTION 28 PROTECTS PERSONAL AND PROPERTY RIGHTS BY REGULATING SPEECH IN A PRIVATE FORUM.

The ability of the advocate to impose on the listener is and should be different when speech occurs in areas where there is a justified expectation that access is limited. In United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981), this Court upheld a postal regulation which prohibited a civic association from distributing its leaflets in mailboxes except through the regular paid post. The court stated that: "(t)here is neither historical nor constitutional support for the

characterization of a letterbox as a public forum." Greenburgh, 453 U.S. at 128.

Telephone solicitation takes place in a private forum. The telephone is much more like a letterbox or radio broadcast than like a public street or park. See Greenburgh, 453 U.S. 114 (1981). It certainly is not an historical arena for public debate. The telephone is the way individuals "reach out and touch someone" they know. When the phone rings, much more so even than when the mail is delivered, one expects the communicator to be known and to convey a personal message. Indeed it is surprising when the voice on the other end is unfamiliar. Such calls are almost universally undesired and to many

annoying.^{11/} Most telephones are inside the home - the quintessential private forum. There is a deeply rooted premise underlying this submission and §28 that there is a right to be let alone in one's home. Gregory v. City of Chicago, 394 U.S. 111, 125-126 (1969).

II. SECTION 28 IS REASONABLE REGULATION AIMED NOT AT SUPPRESSING EXPRESSION OF ANY PARTICULAR VIEWPOINT, BUT AT PROTECTING THE PUBLIC IN THE USE OF THEIR TELEPHONES AND IN THE ENJOYMENT OF THEIR PRIVACY.

A. SECTION 28 IS REASONABLY AIMED AT PROTECTING PEOPLE FROM THE INTRUSION AND ANNOYANCE OF UNWANTED CHARITABLE PHONE APPEALS.

This Court has long recognized the

^{11/} Statistics compiled in a survey for the Pacific Telephone Company indicate that only 0.2% of subscribers polled stated that they liked receiving calls soliciting charitable donations and 1.1% stated that they liked receiving calls of a religious nature. For purposes of comparison 0.1% liked receiving wrong numbers and 0.4% liked receiving crank calls. S. Luten, Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment, 7 Hastings Con L.Q. 129, 162 (Fall, 1979).

appropriateness of legislation which protects the undisturbed enjoyment of the home even where the speech originates in a public forum. In an early case, Kovacs v. Cooper, 336 U.S. 77 (1949), the Court upheld a ban on soundtrucks because their use intruded unreasonably on people in their homes and businesses. In FCC v. Pacifica, 438 U.S. 726 (1977), the Court upheld a ban on obscenity over the radio despite its first amendment implications noting,

Broadcasting - unlike most other forms of communication - comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. 438 U.S. at 759.

Indeed, "... a different order of values obtains in the home." 438 U.S. at 759.

The cases which uphold the right to communicate "door-to-door" all deal with regulation of speech on the public

street. And virtually all of the cases specifically note that property and privacy can be protected by posting a "no solicitors" sign.^{12/} See, e.g., Secretary of State of Maryland v. Munson, 52 U.S.L.W. at 4879 n. 10 (June 26, 1984); Village of Schaumburg v. CBE, 444 U.S. 620, 640 (1980), Martin v. Struthers, 319 U.S. 141, 143, 148 (1943).

The telephone, like broadcasting or a sound truck, invades the home with an unacceptable level of intrusion. Unlike mail which as this Court recently noted, only burdens the recipient with the

^{12/} Section 28 is not however merely the collective posting at a gate or a doorstep of a "no solicitors" sign. Such signs limit access to areas, such as doorsteps, which by history and by tradition are public fora though privately owned. In contrast, the telephone is not a traditional public forum. As such, the citizenry should be able to act collectively to protect the use and enjoyment of their property.

"short, though regular, journey from mailbox to trash can...", Bolger v. Young Drug Products Corp., 103 S. Ct. 2875 (1983), citing Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 800, 883 (SDNY), aff'd 386 F. 2d 449 (CA2 1967), cert. denied 391 U.S. 915 (1968), telephone contact is communication which takes place at a time chosen not by the homeowner but by the caller. The ability to hang up is insufficient to protect the right and expectation of privacy where the forum is the home. The Supreme Court in FCC v. Pacifica specifically noted that though "one may avoid further offense by turning off the radio," 438 U.S. at 748, or changing the channel, these are inadequate remedies. The annoyance or offense has already occurred.

The Attorney General submits that \$28 is the functional equivalent serving

the same goals as the municipal ordinance in Kovacs v. Cooper and in the federal regulation in FCC v. Pacifica.

Concededly, the intent of the Massachusetts Legislature in enacting §28 must be implied.^{13/} The inference of privacy concerns is a fair one, however. It is elucidating that there was considerable public and legal concern in the early 1960's about "...the rising number of incidents of telephone soliciting and of obscene, harassing, and threatening calls."^{14/}

^{13/} Until recently, the legislature did not maintain committee reports, hearing testimony before legislative committees or floor debate.

^{14/} Laws regulating obscene, threatening, harassing or annoying calls were passed by 5 states in 1961, 1 state in 1962, 9 states in 1963, 3 states in 1964, 8 states in 1965, and 2 states in 1966 (30 statutes included regulation of obscene calls, 17 included threatening calls, 16 included harassing calls, 19 included annoying calls). 1967 Utah L. R. supra p. 12, at 404 - 497 (chart).

R. Thompson, Unwanted Telephone Calls
-- A Legal Remedy, 1967 Utah L. R. 379
(1967). See also M. Brenton, The
Privacy Invaders (1964). Indeed §28 was
enacted in Massachusetts in 1964, the
same year that the statute regulating
annoying, obscene and harassing calls
was enacted. Mass. Gen. Laws Ann.
c.269, §14A.

B. SECTION 28 IS NOT AIMED AT
SUPPRESSING A PARTICULAR
VIEWPOINT.

This Court has held that regulation
of speech in a private forum is valid if
reasonable and not aimed at suppressing
a particular viewpoint. Perry Educ.
Ass'n., 103 S. Ct. at 955. Categorical
or "subject-matter" distinctions, as
compared to viewpoint, are permissible
in a private forum. Lehman v. City of
Shaker Heights, 418 U.S. 298 (1974)
(advertising regulation which prohibited

political advertisements only).

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. Perry Educ. Ass'n, 103 S. Ct. at 957.

In Perry, a school board allowed the union which was designated as bargaining agent to use the inter-school teacher mail system but did not allow rival unions such access. The Court upheld this action because there was "... no indication that the school board intended to discourage one viewpoint and advance another." Perry Educ. Ass'n., 103 S. Ct. at 957. Likewise, the viewpoint neutrality of §28 is clear. The regulation on its face states "No

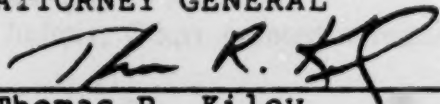
charitable organization" shall use paid operators. Whether for Planned Parenthood or for Moral Majority, paid, boiler room type telephone solicitation is prohibited.

CONCLUSION

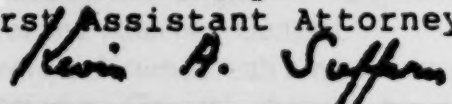
For the reasons stated above, the writ of certiorari should issue to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts.

By its attorneys,


FRANCIS X. BELLOTTI
ATTORNEY GENERAL



Thomas R. Kiley
First Assistant Attorney General



Kevin A. Suffern
Director,
Division of Public Charities



Leslie G. Espinoza
Assistant Attorney General
Division of Public Charities
Public Protection Bureau
One Ashburton Place
Boston, MA 02108
(617-727-2235)

Date:

July 20, 1984

EDITOR'S NOTE

PAGES 709 thru 717 WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC.
v. ATTORNEY GENERAL.

Suffolk January 10, 1984 — April 23, 1984

PRESENT HENNESSEY, C.J., LIACOS, ABRAMS, NOLAN, & O'CONNOR, JJ.

Constitutional Law. Freedom of speech and press. Telephone solicitation.

General Laws c. 68, § 28, prohibiting charitable organizations from using paid telephone operators to solicit contributions, is invalid as infringing on the freedom of speech protected by the First Amendment to the United States Constitution. []

CIVIL ACTION commenced in the Superior Court Department on August 24, 1982.

The case was heard by *Fine, J.*

The Supreme Judicial Court granted a request for direct appellate review.

Catharine W. Hantzis (*Dana L. Mason*, Assistant Attorney General, with her) for the Attorney General.

Peter B. Ellis (*Gerald L. Neuman* with him) for the plaintiff.

LIACOS, J. The Attorney General, through his division of public charities, appeals from a judgment entered in the Superior Court in Suffolk County declaring G. L. c. 68, § 28,¹

¹ General Laws c. 68, § 28, inserted by St. 1964, c. 718, § 1, provides: "No charitable organization shall conduct or make any solicitation of contributions by means of paid telephone operators whose principal duties are the conducting of such telephone solicitation."

A "charitable organization" is defined as "any benevolent, educational, philanthropic . . . organization or one holding itself out to be a charitable organization or one which has received a tax exemption from the United States Government or any state or municipality by reason of its charitable nature." G. L. c. 68, § 18, inserted by St. 1964, c. 718, § 1.

The Attorney General, through his division of public charities, is charged with enforcement of this section. See G. L. c. 68, § 30. See also § 30 (b)-(e) (setting forth civil and criminal sanctions for violations of § 28).

inapplicable to certain recruitment and fund-raising activities conducted by Planned Parenthood League of Massachusetts, Inc. (PPLM), and declaring the statute facially unconstitutional under the First Amendment to the Federal Constitution.² In August, 1982, PPLM had filed a complaint in the Superior Court seeking declaratory and injunctive relief which would enable the organization to conduct its recruitment and fund-raising campaign without subjecting itself to prosecution under G. L. c. 68, § 28. The case was heard on a statement of agreed facts in February, 1983, and the judge issued her order on March 2, 1983. The Attorney General appealed. We granted the joint application of the parties for direct appellate review on July 26, 1983.

The Attorney General contends that § 28 is a lawful statute aimed at protecting individuals from the intrusiveness of telephone calls soliciting charitable contributions.³ He also claims that § 28 aids in preserving the integrity and efficacy of charitable organizations in the Commonwealth. PPLM asserts that § 28 is facially unconstitutional as the statute constitutes an unjustifiable infringement on a charitable organization's constitutional right of free speech. We conclude that the Superior Court judge correctly determined the statute to be facially invalid under the First Amendment to the Federal Constitution.⁴

The parties stipulated to the following relevant facts. PPLM is a charitable organization whose purpose is to promote the exercise of informed reproductive choice by individuals in the

² United States Const. amend. 1, provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech" See also art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution ("right of free speech shall not be abridged").

³ The Attorney General does not argue that the judge erred in ruling that the recruitment and fund-raising activities of PPLM contemplated in 1982 were not precluded by § 28. The issue is deemed waived. Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975). It appears that by agreement of the parties, PPLM has continued such activities pending this court's decision.

⁴ As the trial judge noted, neither party argued that different standards would apply under art. 16 of the Massachusetts Declaration of Rights.

Commonwealth.⁵ PPLM engages in certain lobbying activities with respect to legislative and other governmental issues of concern to the organization and its members. To coordinate and conduct these activities, PPLM relies mainly on the efforts of volunteers in the State who, on request, will write, call, or visit their elected representatives or other government officials concerning issues of importance to PPLM. These volunteers comprise what PPLM refers to as its legislative alert network (network). Participants in the network are not required to be associate members of PPLM. Members and associate members of PPLM, according to the organization's by-laws, must contribute \$25 annually to the organization.

Because previous attempts at recruiting new network volunteers by mail had yielded disappointing results, PPLM decided, in early 1982, to conduct a campaign by telephone using a professional consultant and paid telephone operators.⁶ PPLM sought to recruit, through this campaign, new participants in the network and new associate members of PPLM from current associate members, donors, and persons who previously had expressed an interest in the organization.

⁵ PPLM decided to combine recruitment with fund-raising so as not to duplicate the effort and expense of a separate campaign. The consultant and telephone operators followed PPLM's format for the telephone campaign. That format prescribed that at least 75% of each telephone call was to be devoted to a discussion of matters relating to network recruitment, and no more than 25% of the conversation was to involve a solicitation of financial contributions to PPLM.⁷ PPLM commenced its campaign on September 28, 1982.

⁵ PPLM is recognized by the Internal Revenue Service as a charitable and educational organization exempt from Federal taxation under I.R.C. § 501(c)(3), and is incorporated pursuant to G. L. c. 180.

⁶ PPLM had also experienced difficulty in obtaining volunteers to conduct telephone campaigns.

⁷ The script used as a guideline for these telephone calls requested that an operator begin each call by discussing legislative actions taken on behalf of PPLM in the United States Congress and the Massachusetts General Court. Then the operators were to describe the objectives and functions of

As we have previously noted, the trial judge ruled § 28 inapplicable to the facts of this case, but went on to rule that § 28 is unconstitutional on its face. The latter issue is the only one the parties have argued. Although the issue of the constitutionality of § 28 might be viewed as not properly before us, in view of the public interest involved and the uncertainty concerning when charities in the Commonwealth may subject themselves to liability under this statute,⁴ we address the First Amendment question. See *Wellesley College v. Attorney Gen.*, 313 Mass. 722, 731 (1943).

The constitutionality of G. L. c. 68, § 28. The parties agree that telephone solicitation is a much more effective way of procuring contributions than direct mail requests. PPLM contends that § 28 impermissibly impairs this efficacious method of fund-raising which is protected by the First Amendment. PPLM claims that the statute cannot withstand constitutional scrutiny since its content-based restriction on protected speech is not precisely drawn to promote the asserted State interests.

The Attorney General asks us to uphold § 28 by employing the constitutional analysis used where restrictions are placed on governmentally controlled property. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948, 957-958 (1983). Under this standard the Attorney General claims that § 28 constitutes a reasonable regulation which serves the purposes of protecting residential privacy and promoting the viability and integrity of charitable organizations.

The United States Supreme Court has established definitively that "charitable solicitations in residential neighborhoods," on the streets or from door to door, constitute protected speech under the First Amendment. *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632-633 (1980). See *Martin v.*

the network and ask recipients if they were willing to participate. The operators also were to ask recipients whether they wanted to become associate members or renew their associate membership. Finally, at the end of each call, the operators were to ask recipients whether they would like to make a contribution to PPLM.

⁴ Prior to this action, the Attorney General had pending five civil actions for enforcement of § 28.

Struthers, 319 U.S. 141, 145 (1943).^{*} Other Federal courts have held that telephone solicitations for charitable contributions are within the ambit of the First Amendment's free speech clause. *Optimist Club of N. Raleigh, N.C. v. Riley*, 563 F. Supp. 847, 849 (E.D.N.C. 1982). See also *Walker v. Dillard*, 523 F.2d 3, 4 (4th Cir.), cert. denied, 423 U.S. 906 (1975) (statute criminalizing use of "threatening," "vulgar" language on telephone invalid on overbreadth ground). Accord *Radford v. Webb*, 446 F. Supp. 608, 610-611 (W.D.N.C. 1978), aff'd 596 F.2d 1205 (4th Cir. 1979). "The statute's validity must be analyzed in terms of protected speech and whether the restriction is necessary to vindicate a compelling state interest and is narrowly drawn to achieve that end." *Optimist Club of N. Raleigh, N.C. v. Riley*, *supra*.

The United States Supreme Court has recognized that a State or municipality has the authority "to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing." See *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 616-617 (1976). Restrictions on charitable solicitations, however, "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg v. Citizens for a Better Env't*, *supra* at 632. This is particularly true with respect to educationally oriented organizations like PPLM, as their primary functions involve obtaining and disseminating information on social issues of concern to them, and fund-raising is normally combined with discussing such matters.

^{*}The Court also has expressed consistently the view that the First Amendment applies equally to an association or an individual. "The inherent worth of the speech in . . . informing the public does not depend upon the identity of its source, whether . . . association . . . or individual." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 533 (1980), quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

State action restricting charitable solicitations may be upheld only if the prohibition is a reasonable time, place, or manner regulation, or is in furtherance of a substantial governmental interest, and the restriction on First Amendment rights is no greater than necessary to promote that interest. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 535-536 (1980). See *Opinion of the Justices*, 363 Mass. 909, 916 (1973).

To effectuate legitimate governmental goals, a restriction may regulate in a reasonable way the time, place, or manner of speech, provided that the regulation is applicable to all speech, regardless of content. *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, *supra* at 536. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 537. Since § 28's prohibition applies only to bar paid solicitation by charities, the statute cannot be considered a time, place, or manner restriction. See G. L. c. 68, § 28. See also G. L. c. 68, § 18.

Content-based restrictions on protected speech have been upheld only in the narrow situation where a private party has asserted a right of access to governmentally owned facilities, and the government has shown that partisan speech could jeopardize the functioning of these facilities. See, e.g., *Greer v. Spock*, 424 U.S. 828, 839 (1976) (political activities may be prohibited on military base); *Lehman v. Shaker Heights*, 418 U.S. 298, 302, 304 (1974) (city transit system not compelled to accept political advertisements for display on vehicles). Section 28 regulates speech in the private forum and therefore does not fall within this narrow exception to the constitutional prohibition on content-based restrictions.¹⁰

¹⁰For this reason, we dismiss the Attorney General's argument that regulations on telephonic speech, although concerning communication in a private forum, are subject to a lesser degree of scrutiny. Analogizing telephones to letter boxes and radio broadcasts, the Attorney General asserts that we should apply the same type of analysis to § 28 and uphold the statute as a reasonable restriction in light of the objectives which it seeks to

Section 28 thus may be sustained as a restriction on protected speech only if the statute is narrowly drawn to further a substantial governmental interest without unnecessarily impairing First Amendment rights. See *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Optimist Club of N. Raleigh, N.C. v. Riley*, *supra* at 849. The analysis of a judge of a Federal District Court in the *Optimist Club* case, *supra*, is instructive. The judge held violative of the First Amendment a statute which was similar to § 28 and which made it a misdemeanor for "[a]ny professional [fundraiser to solicit] . . . telephone contributions . . . or in any way [compensate] another person to solicit by telephone contributions for charitable purposes." *Id.* at 848, quoting N.C. Gen. Stat. § 14-401.12 (1981). Although the statute served an important State interest in protecting its citizens from fraudulent practices by charities which used paid solicitors, the court determined that a different statute, which required charities to disclose the purposes for which contributions were used, sufficiently protected this interest by a less intrusive means. *Id.* at 849-850. See *Schaumburg v. Citizens for a Better Env't*, *supra* at 638-639.

The Attorney General asserts that § 28 is aimed at protecting people from unwanted charitable solicitation calls. The statute, he argues further, is meant to promote the viability of charities by ensuring that a profusion of telephone solicitations does not deter giving, and that funds from charities are not squandered on wasteful fund-raising schemes.

Yet § 28 does virtually nothing to promote the State's alleged substantial interest in residential privacy. The statute does not

promote. However, all of the cases on which the Attorney General relies in making this argument are inapplicable to the present matter because they deal with a person's assertion of access to property that is either owned by the government or under substantial government regulation. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra* (restriction on rival union's access to interschool mail facilities constitutional as in furtherance of school property's intended use); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128-129 (1981) (person's mail box authorized depository for U.S. mail; no First Amendment right to place unstamped mail within); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (FCC has authority to limit times of day when indecent material may be broadcast into persons' homes).

preclude unlimited telephone solicitations by volunteers, or by paid operators who do not conduct fund-raising as a principal part of their work for the charity. Moreover, the statute does nothing to prohibit commercial or political solicitation by telephone.¹¹

There is no evidence on the record to show that a proliferation of telephone solicitations will diminish the willingness of people to donate to charitable organizations. "Mere speculation of harm does not constitute a compelling state interest." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, *supra* at 543. Section 28 cannot be sustained on this basis.

The Commonwealth has a substantial interest in ensuring that charitable organizations do not waste their contributions on frivolous fund-raising schemes. Prohibiting charitable solicitations by paid telephone operators is not the least restrictive means to further this objective. Charities could still squander funds in other ways, including other development campaigns which do not involve telephone solicitations.

Even assuming that the statute does serve the purpose of deterring wasteful fund-raising schemes by charities, its general prohibition on charitable solicitation unnecessarily impinges on protected speech. General Laws c. 68, § 19, which requires charitable organizations to disclose their income and expenses for each fiscal year and the purposes for which contributions shall be used, provides an efficacious means of monitoring the spending policies of charities, and does not impair First Amendment freedoms.¹²

¹¹ Assuming that § 28 furthers the State's interest in residential privacy to some extent, there are certainly less intrusive and more practicable ways of serving this objective. Bills have been filed in other States which would enable individuals to request that the telephone company place an asterisk next to their names in the directory to indicate their unwillingness to receive solicitation calls. See Note, Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment, 7 Hastings Const. L.Q. 129, 158 (1979-1980) (bills filed in Indiana and Wisconsin Legislatures). See also *id.* at 159 (congressional proposals for bill requiring solicitors to pay for list of residential subscribers unwilling to receive commercial solicitations).

¹² General Laws c. 68, § 19, as amended by St. 1980, c. 572, § 22, provides in relevant part: "Every charitable organization which intends to

Because G. L. c. 68, § 28, significantly abridges First Amendment rights and is not precisely drawn to further a substantial governmental interest, we hold that the statute is facially unconstitutional under the First Amendment.¹³

Judgment affirmed.

solicit contributions from persons in this commonwealth . . . shall, prior to any solicitation, file a registration statement with the division . . . Such statements . . . shall contain the following information: . . . a copy of the balance sheet and income and expense statement for the organization's immediate preceding fiscal year audited by an independent public accountant. . . the principal purpose or purposes for which the contributions to be solicited shall be used; . . . the names of the individuals or officers of the organization who shall have final responsibility for the custody of the contributions, [and] . . . the names of the individuals or officers of the organization responsible for the final distribution of the contributions."

Other sections of the statute are relevant. See, e.g., G. L. c. 68, § 20 (certain charities exempt from provisions of § 19, e.g., religious organizations established for religious purposes, educational institutions which are exempt from Federal income taxation, charitable organizations which do not actually raise or receive contributions in excess of \$5,000 during a calendar year, if all of their functions are carried on by persons who are unpaid for their services and if no part of their assets or income inures to the benefit of, or is paid to any officer or member). The Attorney General or a district attorney may institute an action for injunctive relief or such other appropriate relief against any charitable organization which has violated the registration and disclosure provisions of § 19 or "has participated or is about to participate in any solicitation . . . by employing any scheme . . . to defraud or obtain money or other property." See G. L. c. 68, § 30 (e), inserted by St. 1964, c. 718, § 1.

¹³ We need not consider PPLM's arguments that the statute is unconstitutionally vague, or a violation of equal protection or freedom of association.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 56792

PLANNED PARENTHOOD LEAGUE OF
MASSACHUSETTS, INC.,
Plaintiff

vs.

FRANCIS X. BELLOTTI, as he is
Attorney General
of the Commonwealth of Massachusetts
Defendant

MEMORANDUM AND ORDER

Plaintiff, Planned Parenthood League of Massachusetts, Inc. (hereinafter "PPLM"), a charitable organization, has brought this complaint for declaratory and injunctive relief against the Attorney General of the Commonwealth in his capacity as overseer of charitable funds. The issue raised is the constitutionality of G.L. Chapter 68,

Section 28, as applied to PPLM's current and planned telephone solicitation for charitable contributions and other forms of assistance. General Laws, Chapter 68, Section 28 provides as follows:

"No charitable organization shall conduct or make any solicitation of contributions by means of paid telephone operators whose principal duties are the conducting of such telephone solicitation."

The parties have agreed to an extensive "Stipulation of Facts" and I find the facts to be as contained in the Stipulation, which is incorporated herein by reference.

The first question is whether the statute covers PPLM's current Legislative Alert Network campaign. I rule that it does not. The principal duties of the operators are to recruit volunteers to engage in lobbying, activities wholly unrelated to raising

funds. The solicitation of funds above and beyond dues from members is secondary in importance, considering both the purpose of the contact and the relative time spent on the two activities.

Notwithstanding this ruling, I have determined that I should address the constitutional issues raised, among other reasons, because, as indicated in the Stipulation, PPLM plans during 1983 to conduct at least one telephone campaign using paid telephone operators whose only duties will be the solicitation of memberships and other contributions, the right to do so would be of substantial value to PPLM in raising funds, and exercise of that right would subject PPLM to a risk of criminal prosecution. Thus, PPLM has a

substantial stake in the outcome of litigation of this issue.

In my view the statute is unconstitutional on its face because it unreasonably restricts rights protected by the First Amendment to the United States Contribution^{1/} of groups such as PPLM. Charities attempting to solicit funds have the right to protection under the First Amendment because those activities involve speech, communication and expression of idea. While charitable solicitation may be subject to reasonable regulation, any restrictions "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive

1/ Neither party argued that different principles would apply under the Massachusetts Contribution.

speech seeking support for particular views ... and for the reality that without solicitation the flow of such information and advocacy would likely cease." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980). It should also be noted that the telephone network is a primary means of communication in modern society, and therefore telephone solicitations, as well as door-to-door and mail solicitations, are entitled to First Amendment protections.

The issue is whether the restriction on speech in this instance is necessary to vindicate a compelling state interest and is narrowly drawn to that end. In a recent U.S. District Court case, a North Carolina statute prohibiting telephone solicitation of charitable contributions by professional solicitors was struck

down as infringing impermissibly First Amendment rights. Optimist Club of North Raleigh v. Riley, No. 82-293-Civ. 5 (E.D.N.C. 1982). The interest put forth in that case as justifying the statute was the state concern with the protection of citizens against fraud. The court found that less restrictive means were available to protect the public. Similarly in Schaumberg, supra, the court found that the legitimate interest in preventing fraud could be accomplished by measures less intrusive than the restrictive measure in issue which the court struck down.

The Attorney General relies on a different state interest in this case, the interest in protecting the public's right to privacy. There is no question that it is proper for a legislature to concern itself with the privacy rights

of people in their homes; nor is it disputed that unsolicited telephone calls can be annoying and can interfere with those privacy rights.

Nevertheless, the prohibition of the right to communicate in this case goes too far to pass constitutional muster. The door-to-door solicitation cases are analogous. In a series of cases involving prohibitions against door-to-door solicitation for charitable or political purposes the court struck down the measure because it was not drawn with sufficiently narrow specificity. In doing so the court indicated that the only type of restriction which would be approved would be one which left the decision with the homeowner as to whether or not he wished to have his privacy disturbed. Martin v. Struthers, 319

U.S. 141 (1943); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976). See also Lamont v. Postmaster General, 381 U.S. 301 (1965) and Rown v. Post Office Department, 397 U.S. 727 (1970). The unsolicited appearance of a stranger at the door to one's home is, in my view, a significantly greater intrusion on one's privacy than the receipt of an unsolicited telephone call. The homeowner has greater control when he picks up a telephone than when he is face to face with a stranger. When the telephone rings, after hearing a brief message, the homeowner can hang up. If he wants no unsolicited calls at all, he can arrange to have an unpublished number. If the state may not prohibit door-to-door solicitation, except when the homeowner indicates by a sign or otherwise that he does not wish to be

disturbed,^{2/} a fortiori, a state may not prohibit telephone solicitation for charitable purposes.

The question remains whether the statute is nevertheless valid because it is a narrowly drawn restriction designed to carry out the interest in protecting privacy. The distinctions made in the statute, however, have nothing to do with privacy. The statute distinguishes between agencies which are charitable in nature and those which are commercial, social or political but, if anything, the annoyance to the public is greater if the call is a commercial one. The fact that the solicitors are paid and

^{2/} It would, of course, be a stronger case for the plaintiff if the means existed to have telephone customers indicate in a directory that they do not want unsolicited calls.

not volunteers has nothing to do with any privacy interest. The fact that the solicitation of funds may be the operator's principal duty is also irrelevant to whether or not the recipient of a phone call is disturbed at home. The measure is not merely a reasonable restriction on time, place of manner of speech. It comes close to being a restriction on content since it deals only with charitable, as opposed to commercial or political, solicitation, and it deals only with requests for funds as opposed to other types of requests or communications.

Because I do not view it as necessary, having concluded that the statute is unconstitutional because it violates the First Amendment, I do not

address the arguments relating to equal protection, freedom of association or vagueness.

ORDER

General Laws, Chapter 68, Section 28 is declared unconstitutional and the defendant is enjoined from enforcing it.

Edith W. Fine
Justice of the
Superior Court

Dated: March 2, 1983

APPENDIX C

N.B. FOR CLERK'S USE ONLY

JUDGMENT ENTERED ON DOCKET JUNE 22, 1984
PURSUANT TO MASS.R,CIV.P.77(d)AS FOLLOWS
.....

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK,ss. SUPERIOR COURT DEPT.
OF THE TRIAL COURT
CIVIL ACTION NO.
56792

PLANNED PARENTHOOD LEAGUE OF
MASSACHUSETTS, INC.

Plaintiff(s)

v.

FRANCIS X. BELLOTTI, ATTY, GENERAL
OF THE COMMONWEALTH OF MASS,
Defendant(s)

JUDGMENT FOR PLAINTIFF[S] AFTER
RESCRIPT (PURSUANT TO MASS.R.A.P.28)

This action was appealed to the *Appeals
Court-Supreme Judicial Court-the issues
having been duly heard and the APPEALS
Court having duly issued a rescript, it
is ordered and adjudged: -

General Laws, Chapter 68, Section 28
is declared unconstitutional and the
defendant is enjoined from enforcing
it.

Dated at Boston, Massachusetts, this
14th day of June 1984.

MICHAEL JOSEPH DONOVAN
Clerk of Court

By: (SGD) John Peter
(Connolly, Asst. Clerk

A TRUE COPY OF JUDGMENT DULY ENTERED
ON JUNE 22, 1984 A.M.

APPENDIX D

CHAPTER SIXTY-EIGHT

MASSACHUSETTS GENERAL LAWS

SOLICITATION OF CHARITABLE FUNDS

SECTION 18. Definitions. When used in this section, and in sections nineteen to thirty-one, inclusive, the following terms shall have the following meanings:--

"Charitable Organizations", any benevolent, educational, philanthropic, humane, patriotic or eleemosynary individual, trustee, organization, society or any combination of them, or one holding itself out to be a charitable organization or one which has received a tax exemption from the United States Government or any state or municipality by reason of its charitable nature.

"Contributions", the promise or grant of any money or property or anything of value except payments by members of an organization for membership fees, dues, fines or assessments or for services rendered to individual members if membership in such organizations confers a bona fide right, privilege, professional standing, honors or other direct benefit;

"Director", the director of the division of public charities in the department of the attorney general;

"Division", the division of public charities in the department of the attorney general;

"Parent organization", that part of a charitable organization which coordinates, supervises or exercises

control over policy, fund-raising and expenditures; or assists or advises one or more chapters, branches or affiliates in this commonwealth;

"Person", any individual, organization, trust, foundation, group, association, partnership, corporation, society or any combination of them;

"Professional fund-raising counsel", any person who, for a flat fixed fee, under a written contract plans, conducts, manages, carries on, advises or acts as a consultant whether directly or indirectly in connection with soliciting contributions for or on behalf of any charitable organization but who actually solicits no contributions as part of such services, A bona fide salaried officer or regular nontemporary employee of a charitable organization maintaining a permanent establishment within the commonwealth shall not be deemed to be a professional fund-raising counsel;

"Professional solicitor", any person who is retained for a financial or other consideration, whether on a percentage or other basis, by a charitable organization or by any person who acts on behalf of a charitable organization to solicit contributions directly or in the form of payment for goods or services in this commonwealth for charitable purposes whether such solicitation is done individually or through the agents, servants or employees of any such person so retained or through the agents, servants or employees of any such person so retained or through agents, servants or employees specially recruited for a charitable solicitation on the payroll of a charitable organization who are engaged

in the solicitation of contributions under the direction of such person so retained. A bona fide salaried officer or regular, nontemporary employee of a charitable organization maintaining a permanent establishment within the commonwealth shall not be deemed to be a professional solicitor. No attorney, investment counselor or banker who advises an individual corporation or association to make a charitable contribution shall be deemed, as the result of such advice, to be a professional fundraising counsel or a professional solicitor.

1964, 718, §1.

SECTION 19. Certificate of registration; application; fee. Every charitable organization, except those granted exemption in section twenty of this chapter, which intends to solicit contributions from persons in this commonwealth or have funds solicited on its behalf by other charitable organizations shall, prior to any solicitation, file a registration statement with the division upon prescribed forms, which shall be refiled in the next and each following year in which such charitable organization is engaged in solicitation activities. Provided that the provisions of this chapter have been complied with, the director of the division shall issue a certificate of registration to a charitable organization within ten days of receipt of the registration statement. No charitable organization required to be registered under this section shall solicit funds without a valid certificate of registration. The

president, chairman or principal officer of such charitable organization shall file the statements required under sections eighteen to thirty-one of this chapter. Such statements shall be sworn to and shall contain the following information: (1) The name of the organization and the purpose for which it was organized; (2) the address of the organization and the address of any offices in this commonwealth or, if the organization does not maintain an office, the name and address of the person having custody of its financial records; (3) the place where and the date when the organization was legally established, the form of its organization and its tax exempt status for federal income tax purposes; (4) the names and the addresses of the officers, directors and trustees and the principal salaried executive staff officers; (5) a copy of the balance sheet and income and expense statement for the organization's immediate preceding fiscal year audited by an independent public accountant, provided, however, that if the charitable organization has filed the information required under section eight of chapter twelve within six months prior to the filing of the registration statement, the fiscal statement required hereby need not be filed; (6) whether the organization intends to solicit contributions from the public; (7) whether the organization is authorized by any other governmental authority to solicit contributions and whether it is or has ever been enjoined by any court from soliciting contributions; (8) the principal purpose or purposes for which

president, chairman or principal officer of such charitable organization shall file the statements required under sections eighteen to thirty-one of this chapter. Such statements shall be sworn to and shall contain the following information: (1) The name of the organization and the purpose for which it was organized; (2) the address of the organization and the address of any offices in this commonwealth or, if the organization does not maintain an office, the name and address of the person having custody of its financial records; (3) the place where and the date when the organization was legally established, the form of its organization and its tax exempt status for federal income tax purposes; (4) the names and the addresses of the officers, directors and trustees and the principal salaried executive staff officers; (5) a copy of the balance sheet and income and expense statement for the organization's immediate preceding fiscal year audited by an independent public accountant, provided, however, that if the charitable organization has filed the information required under section eight of chapter twelve within six months prior to the filing of the registration statement, the fiscal statement required hereby need not be filed; (6) whether the organization intends to solicit contributions from the public; (7) whether the organization is authorized by any other governmental authority to solicit contributions and whether it is or has ever been enjoined by any court from soliciting contributions; (8) the principal purpose or purposes for which

the contributions to be solicited shall be used; (9) the name or names under which it intends to solicit contributions; (10) the names of the individuals or officers of the organization who shall have final responsibility for the custody of the contributions; (11) the names of the individuals or officers of the organization responsible for the final distribution of the contributions. The registration forms and any other documents prescribed by the division shall be signed by any two authorized officers, including the chief fiscal officer, of the charitable organization and shall be verified under oath. Every charitable organization except those granted exemption under section twenty of this chapter shall pay a registration fee of ten dollars. Every charitable organization having one or more chapters, branches or affiliates in this commonwealth and filing in behalf of such chapter, branches or affiliates shall pay a single registration fee. 1964, 718, §1.

SECTION 20. Exemptions. The following shall not be required to file registration statements with the division or to have a certificate of registration under section nineteen: (1) any religious corporation, trust or organization incorporated or established for religious purposes, nor any agency or organization incorporated or established for charitable, hospital or educational purposes and engaged in effectuating one or more of such purposes, which is affiliated with,

operated by, or supervised or controlled by a corporation sole or other religious corporation, trust or organization incorporated or established for religious purposes, nor any other religious agency or organization which serves religion by the preservation of of religious rights and freedom from persecution or prejudice or by fostering religion, including the moral and ethical aspects of a particular religious faith; (2) educational institutions which by ruling of the United States Treasury Department are exempt from federal income taxation; (3) parent-teacher associations; (4) persons requesting contributions for the relief of any individual specified by name at the time of the solicitation when all of the contributions collected, without any deductions whatsoever, are turned over to the named beneficiary for his use; (5) charitable organizations which do not actually raise or receive contributions from the public in excess of five thousand dollars during a calendar year or do not receive contributions from more than ten persons during a calendar year, if all of their functions, including fund-raising activities, are carried on by persons who are unpaid for their services and if no part of their assets or income inures to the benefit of, or is paid to any officer or member; provided, if the contributions raised from the public, whether or not all is received by any charitable organization during any calendar year, is in excess of five thousand dollars, it shall within thirty days after the date it shall have

received total contributions in excess of five thousand dollars, register with and report to the division as required by section nineteen; (6) nonprofit and charitable hospitals; (7) public libraries; (8) organizations which solicit only from their own membership; (9) persons soliciting contributions solely from charitable foundations; (10) foundations or associations exclusively for the benefit of religious organizations, educational institutions, nonprofit or charitable hospitals and public libraries; (11) volunteer fire companies.

1981, 345, \$1.

SECTION 21. Professional solicitors; filing of contracts; disapproval of contracts. (a) No charitable organization required to have a certificate of registration pursuant to the provisions of sections eighteen to thirty-one, inclusive, shall agree to pay a professional solicitor or its agents, servants or employees, including agents, servants or employees assigned to work under the direction of a professional solicitor, in the aggregate a total amount in excess of fifteen percent of the total moneys, pledges or other property raised or received by reason of any solicitation activities or campaigns, including reimbursement for expenses incurred. (b) For purposes of this section, the total moneys, funds, pledges or other property raised or received shall be computed by first deducting therefrom the actual cost to the charitable organization or professional solicitor of goods sold or

services provided to the public in connection with the soliciting of contributions, (c) Every contract between a professional fund-raising counsel and a charitable organization and every contract or a written statement of the nature of the arrangement to prevail in the absence of a contract between a professional solicitor and a charitable organization required to have certificate of registration pursuant to the provisions of sections eighteen to thirty-one, inclusive, shall be filed with the director of the division within ten days after such contract or written arrangement is entered into or within ten days after performance by said professional fund-raising counsel or said professional solicitor begins pursuant to such contract or written arrangement, whichever time is earlier.

If the contract or arrangement with a professional solicitor does not provide for compensation on a percentage basis, the director shall examine the contract to ascertain whether the compensation to be paid in such circumstances is likely to exceed fifteen percent of the total moneys, pledges or other property raised or received as a result of the contract or arrangement. If the reasonable probabilities are that the ompensation will exceed such fifteen percent, the director shall disapprove such contract within ten days after its filing. No charitable organization or professional solicitor shall carry out or execute a disapproved contract or receive or perform services or receive or make payments pursuant to a disapproved

contract. Any party to a disapproved contract shall upon request be given a hearing before the division within fifteen days. Any charitable organization or professional solicitor who violates this section by executing a disapproved contract, performing services or receiving or making payment on such contract, shall be punished by a fine of not less than one thousand dollars or by imprisonment in a house of correction for not more than six months, or by both such fine and imprisonment.

1981, 345, §2.

SECTION 22. Fund-raising costs, limitation to fifty percent. The director shall not issue a certificate of registration to any charitable organization which devotes more than fifty percent of its gross income to salaries, wages and expenses related to soliciting or receiving contributions on behalf of the organization unless it is determined by the director after investigation and an opportunity for a hearing by the organization before an adverse decision is made that it would be in the public interest to allow the organization to solicit funds from the public, notwithstanding the fact that the charitable organization devotes more than fifty percent of its gross income to salaries, wages and expenses related to soliciting or receiving contributions on behalf of the organization. There shall be a right of review of the decision of the director in accordance with the provisions of chapter thirty A, 1964, 718, §1

SECTION 23. Professional fund-raising counsel and solicitors; registration; filing of bond; denial of registration. (a) No person shall act as a professional fund-raising counsel or professional solicitor for a charitable organization required to have a certificate of registration pursuant to the provisions of sections eighteen to thirty-one, inclusive, unless he has first registered with the division. Applications for such registration shall be in writing under oath in the form prescribed by the division and shall contain such information as the division may require. The application for registration by a professional fund-raising counsel or professional solicitor shall be accompanied by an annual fee in the sum of ten dollars. A partnership or corporation which is a professional fund-raising counsel or professional solicitor may register for and pay a single fee on behalf of all its members, officers, agents and employees. (b) The applicant shall, at the time of making application, file with and have approved by the division a bond in which the applicant shall be the principal obligor in the sum of ten thousand dollars with one or more sureties satisfactory to the division whose liability in the aggregate shall at least equal said sum. Said bond shall run to the division for the use of the commonwealth and to any charitable organization which may have a cause of action against the obligor of said bond for any malfeasance or misfeasance in the conduct of solicitation activities.

A partnership or corporation which is a professional fund-raising counsel or professional solicitor may file a consolidated bond on behalf of all its members, officers and employees. The aggregate liability of the surety for all breaches of the conditions of the bond shall, in no event, exceed the sum of said bond. (c) Each registration shall be valid for a period of one year or a part thereof and may be renewed for additional one-year periods upon written application under oath in the form prescribed by the division and containing such information as it may require and the filing of the bond and the fee prescribed herein. (d) The director of the division shall examine each application and, if he finds it to be in conformity with the requirements of this section and sections nineteen to thirty-one and all relevant rules and regulations and the registrant to have complied with the requirements of said sections and all relevant rules and regulations, he shall approve the registration. Any applicant who is denied approved registration may within fifteen days from the date of notification of such denial request in writing a hearing before the division which hearing shall be held within fifteen days from the date of the request.

1964, 718, §1

SECTION 24. Contracts, registration forms, reports to be public records.

Registration statements and applications, reports, professional fund-raising counsel contracts or professional solicitor contracts and all

other documents and information required to be filed under sections nineteen to thirty-one, inclusive, or by the division shall be public records in the office of the division and shall be open to the general public for inspection at such times as the division may prescribe.

1964, 718, §1

SECTION 25. Fiscal records; inspection; retention. Every charitable organization required to have a certificate of registration under section nineteen, shall, in accordance with the rules and regulations prescribed by the division, keep true fiscal records as to such activities in Massachusetts as may be covered by sections eighteen to thirty-one inclusive, in such form as will enable it or him accurately to provide the information required by said sections. Upon demand such records shall be made available to the division for inspection. Such records shall be retained for a period of at least three years after the end of the period of registration to which they relate.

1964, 718, §1

SECTION 26. Exchange of information with other states by division. The division may enter into reciprocal agreements with the appropriate authority of any other state for the purpose of exchanging information with respect to charitable organizations, professional fund-raising counsel and professional solicitors. Pursuant to such agreements the division may accept information filed by a charitable organization with the appropriate authority of another state in lieu of

the information required to be filed by the charitable organization in accordance with the provisions of sections nineteen to thirty-one, inclusive, if such information is substantially similar to the information required under said sections.

1964, 718, §1.

SECTION 27. Exploitation of registration prohibited; misleading of public; written authorization. (a) No charitable organization, professional fund-raising counsel or professional solicitor subject to the provisions of sections nineteen to thirty-one, inclusive, shall use or exploit the fact of registration so as to lead the public to believe that such registration in any manner constitutes an endorsement or approval by the commonwealth. (b) No person shall, in connection with the solicitation of contributions for or the sale of goods or services of a person other than a charitable organization, misrepresent to or mislead any one by a manner, means, practice or device whatsoever to believe that the person on whose behalf such solicitation or sale is being conducted is a charitable organization or that the proceeds of such solicitation or sale will be used for charitable purposes if such is not the fact. (c) No person shall in connection with the solicitation of contributions or the sale of goods or services for charitable purposes represent to or lead any one by any manner, means, practice or device whatsoever to believe that any other person sponsors or endorses such solicitation of contributions, sale of

goods or services for charitable purposes or approves of such charitable purposes or a charitable organization connected therewith when such other person has not given consent to the use of his name for these purposes. Any member of a board of directors of trustees of a charitable organization or any other person who has agreed either to serve or to participate in any voluntary capacity in the campaign shall be deemed thereby to have given his consent to the use of his name in connection with the progress of such campaign. (d) No person shall make any representation that he is soliciting contributions for or on behalf of a charitable organization or shall use or display any emblem, device or printed matter belonging to or associated with a charitable organization for the purpose of soliciting or inducing the contribution of funds from the public without first being authorized to do so by the charitable organization. (e) No professional solicitor shall solicit in the name of or on behalf of any charitable organization unless he has in his possession the written authorization of two officers of such organization, a copy of which shall be filed with the division, and exhibits such written authorization on request to any person solicited, to any police officer or to any agent of the division. Such authorization shall bear the signature of the solicitor and shall state on its face the period for which it is valid, which shall not exceed one year from the date issued.

1964, 718, §1

1965, 324

SECTION 28. Use of paid telephone operators prohibited. No charitable organization shall conduct or make any solicitation of contributions by means of paid telephone operators whose principal duties are the conducting of such telephone solicitation.

1964, 718, §1

SECTION 29, Substitute service upon Secretary of State. Any charitable organization or professional fundraising counsel or professional solicitor having its principal place of business without the commonwealth or organized under and by virtue of the laws of a foreign state which solicits contributions from people in this commonwealth subject to sections nineteen to thirty-one, inclusive, shall be subject to the provisions of said sections, and shall be deemed to have irrevocably appointed the state secretary as its agent upon whom may be served any summons, subpoena duces tecum or other process directed to such charitable organization or any partner, principal officer or director thereof, professional fundraising counsel or professional solicitor in any action or proceeding brought under the provisions of said sections. Service of such process upon the secretary shall be made by personally delivering to and leaving with him a copy thereof at the office of said secretary in Boston and such service shall be sufficient service; provided notice of such service and a copy of such process shall be forthwith sent by said secretary to such charitable organization or professional

fund-raising counsel or professional solicitor by registered mail, with return receipt requested at its or his office as set forth in the registration form required to be filed in the division pursuant to sections nineteen and twenty-three, or in default of the filing of such form at the last address known to said secretary,

1964, 718, \$1.

SECTION 30. Cancellation of registration; penalties; enforcement by Attorney General and District Attorneys.

(a) If any registered charitable organization, professional fund-raising counsel or professional solicitor fails to file any registration application or statement, annual report or other information required to be filed by the division under sections nineteen to thirty-one, inclusive, the division shall notify the delinquent charitable organization, professional fund-raising counsel or professional solicitor by mailing a notice by registered mail to its last known address. If the required registration application or statement, annual report or other information is not filed within two weeks after the formal notification of receipt of such notice, the division may cancel or suspend the registration of such delinquent charitable organization. (b) The division, upon its own motion or upon complaint of any person, may investigate any charitable organization and any professional fund-raising counsel or professional solicitor to determine whether such charitable

organization, professional fundraising counsel or professional solicitor has violated the provisions of sections nineteen to thirty-one, inclusive, or has filed any application required under said sections which contains false or misleading information. If the division finds that any information contained in an application is false or misleading or that a registrant under sections nineteen to thirty-one, inclusive, has violated said sections, it may suspend or cancel the registration and revoke the certificate of registration. (c) The registration of any charitable organization, professional fund-raising counsel or professional solicitor which or who knowingly makes a false statement in any registration application or statement, annual report or other information required to be filed by the division or sections nineteen to thirty one, inclusive, shall be revoked by the division. (d) Any person who knowingly violates any provision of sections nineteen to thirty-one, inclusive, or who wilfully and knowingly gives false or incorrect information to the division in filing statements or reports required by said section, whether such report or statement is verified or not, may be fined not more than one thousand dollars or imprisoned not more than one year or both. (e) Whenever the attorney general or any district attorney has reason to believe that any charitable organization, professional fund-raising counsel or professional solicitor is operating in violation of the provisions of sections nineteen to thirty-one,

inclusive, or has knowingly and willfully made any false statement in any registration application or statement, report or other information required to be filed under said sections, or whenever a charitable organization has failed to file a registration statement required under said sections, or whenever there is employed or is about to be employed in any solicitation or collection of contributions for a charitable organization any device, scheme or artifice to defraud or to obtain money or property by means of any false pretense, representation or promise, or whenever any of the principal officers of any charitable organization have refused or failed after notice to produce any records of such organization, in addition to all other actions authorized by law, the attorney general or district attorney may bring an action in the name of the commonwealth against such charitable organization and its officers, such professional fundraising counsel or professional solicitor or any other person who has violated said sections or who has participated or is about to participate in any solicitation or collection by employing any device, scheme, artifice, false representation or promise, to defraud or obtain money or other property, to enjoin such charitable organization or professional fund-raising counsel or professional solicitor or other person from continuing such violation, solicitation or collection or engaging therein or doing any acts in furtherance thereof

and for such other relief as to the court seems appropriate.

1964, 718, §1.

SECTION 31. Charitable organizations deemed fiduciaries. Every person and every corporation or other organization, association, firm or group of persons, collecting or expending contributions for charitable purposes solicited from the public, and every officer and employee of any such corporation, organization, association, firm or group concerned with the collection or expenditure of such funds shall be deemed to be a fiduciary and acting in a fiduciary capacity.

1964, 718, §1.

SECTION 32. Common Fund for Nonprofit Organizations; membership; investments; Any organization organized under the laws of the commonwealth, if eligible for membership, may become a member of The Common Fund for Nonprofit Organizations, a New York nonprofit membership corporation authorized under section eight E of chapter twelve to operate in the commonwealth and organized to aid and strengthen such corporations, community chests, funds and foundations as are organized and operated exclusively for nonproprietary and nonprofit-making purposes and otherwise eligible for membership by providing means for the investment of their funds in shares or interests in one or more common funds. Any such organization may, either as fiduciary or

otherwise, and in addition to any other lawful investment, invest any part or all of the funds which it holds for investment in shares or interests in a common fund or funds established by The Common Fund for Nonprofit Organizations; provided, that in the case of funds held as fiduciary, such investment is not prohibited by the language of the will, deed or other instrument creating the fiduciary relationship. (1971 Enactment, St. 1971, c.595, an emergency act, was approved August 5, 1971.)

SECTION 33. Paid Solicitations. Any person, organization, trust, committee, foundation, group, association, partnership, corporation, society, or any combination thereof, which solicits donations or money or other things of value from the public by door-to-door visitation or in person for any charitable, civic or political cause or purpose, and which received, or other contractual remuneration or thing of value, but not to include reimbursements for expenses incurred in soliciting, shall inform each person, as defined in section eighteen, so solicited that the solicitation is a paid solicitation. Such information shall be so provided in writing or in the form of a clearly displayed badge or sign bearing the words "Paid Solicitor". All persons hired or paid by such person, organization, trust, foundation, group, association, partnership, corporation, society, or any combination thereof, who violate this section shall be punished by a fine of one hundred dollars for each such violation.

The provisions of this section shall not apply to the finance chairman, accountant, treasurer or auditor of any such organization, trust committee, foundation, group, association, partnership, corporation, society, or any combination thereof provided that such financial officer is not directly soliciting; nor shall such provisions apply to any ordained clergyman, minister, priest, rabbi, officer or any duly authorized member of any religious order or any other tax exempt religious or educational or hospital organization.

1979, 658